Summary of proposed changes to the Developmental Disabilities Services Regulations

General:

Overall, the format of the *Regulations Implementing the Developmental Disabilities Act of 1996 (effective 10.1.17)*, is being changed to conform to the Vermont's Health Care Administration Rules formatting guidance. Many changes are simply numbering and lettering changes. These rules also require use of the terms "will" and "must" rather than "shall".

The Developmental Disabilities Services Division has drafted the proposed rule changes primarily in Part 2: Criteria for Determining Developmental Disability and Part 8: Grievance, Internal Appeal and Fair Hearing. The primary reason for making changes to Part 2 which describes who is eligible to receive DD services, relates to a 2019 VT Supreme Court decision indicating a lack of clarity in the regulations related to consideration of the standard error of measurement in IQ test scores. The proposed changes are to create greater clarity in this regard.

Part 8, which deals with grievance and appeals, is being changed to comply with updated federal regulations related to grievance and appeals in Medicaid (42 C.F.R Part 438, Subpart F). The Department of Vermont Health Access (DVHA) updated the regulations for grievance and appeals for all VT Medicaid services on 6/1/18 (after publication of the 10.1.17 DDS regulations) to comply with the federal requirements (see HCAR 8.100). DDSD has been following these rules since that time. The proposed change eliminates the current DDS regulation for grievance and appeals and refers the current VT rule which is being used now. DDS as a Medicaid program is required to follow these new rules.

Below is a summary of changes and the rationale for the change. This list only includes only those changes in language, not the formatting changes.

Item	**Proposed change and rationale**
7.100.1*	Adding an introduction to the rule and citing the authority under which the DDS program operates.
1.3	Definition of "appeal" removed due to HCAR 8.100 replacing current DDS rules related to grievance and appeals.
1.5	"Fiscal Employer/Agent" (FE/A) is removed from list of items which are not included in the authorized funding limit. The funds for the FE/A have been removed from individual Home and Community-based Services (HCBS) budgets as they are now being billed directly to Medicaid by the FE/A. These funds were not part of the AFL and have no impact funds available for individual services.
1.15	Definition of "designated representative" removed due to HCAR 8.100 replacing current DDS rules related to grievance and appeals.
1.47	Change definition of "young child" to mean child under age six from "not yet old enough to enter first grade" to align with VT special education rules for Early Childhood Special Education (ESCE) which provides services to children ages 3-5 and Children's Integrated Service – Early Intervention (CIS-EI) which serves children birth-2.11. Aligning with ESCE and CIS-EI allows intake staff at provider agencies to utilize existing assessment information from those programs. This alleviates the need, time, and expense of having new testing completed which is more efficient and less burden on the children and families. Specifying a specific age (under six) is clearer than "not yet old enough to enter first grade".

2.1(a)	Align language with regulations for ECSE and CIS-EI. Multisystem developmental disorder is not a medical diagnosis listed in the current versions of diagnostic manuals (Diagnostic and Statistical Manual (DSM) or International Classification of Diseases (ICD)).
2.1(b) (c)	Relabeling the developmental areas to align with those used in regulations for ECSE and CIS-EI.
2.2(a)	The diagnoses listed in 2.1(a) are made by physicians not psychologists. This is a technical correction.
2.2(b)	Aligning language with 2.1 (b-c). Explored changes to criteria for young children to define the terms "significant, observable and measurable". Met with staff from Agency of Education and reviewed their regulations for eligibility for ECSE and CIS-EI to consider aligning eligibility criteria. Consulted with 2 psychologists in VT. After exploration, decided not to add definitions. The criteria for ECSE and CIS-EI are different from each other. The criteria used is more inclusive of disabilities beyond ID and ASD. It is also not the Division's intention to narrow the criteria for eligibility for young children.
2.2(b)(1)	Updating terms and adding typical team members.
2.4(a)	Clarifies that the standard error of measurement (typically +/- 5 points) for IQ tests can be considered when making a diagnosis of intellectual disability. This is based on the Supreme Court case ruling. DDSD has been following this practice since the 2019 ruling when making eligibility decisions. DDSD monitored the number of individuals who came into services with IQs between 70 and 75 since that time and there has not been a substantial increase in the number of people who have been found eligible with scores in that range.
2.6(h)	Moved to section 2.5. Reiterating that the criteria for determining whether a person has an "intellectual disability" is as described in these regulations and not the definition in the DSM. The criteria in these regulations aligns with the DSM but the regulations include more specific cut off scores from testing and more details for the assessment process. This allows for more clarity in making and supporting determinations of eligibility.
2.6(d)	Added language to specify that the licensed psychologist should include their clinical opinion about which past test scores are the best estimate of a person's cognitive ability and his/her rationale in the written evaluation.
2.8	Specifying that people who were found eligible prior to 10.1.17 (the effective date of the current regulations) would continue to be eligible is found eligible based on previous versions of the DSM which were in effect at that time. As noted in 2.10, new applicants must be assessed using the DSM criteria in effect at the time of application.
2.11	Although not addressed in the Supreme Court case specifically, it seems logical that the standard error of measurement for adaptive behavior scores should also be considered in determining eligibility. The standard error of measurement is not the same for all assessment tools, so a specific point range was not included. For the commonly used ABAS assessment, the standard error of measurement is +/- 3 points. It is also proposed to drop the requirement of having adaptive behavior deficits in at least 2 of the areas listed. The consulting psychologists indicate that statistically that criteria would rarely be used as almost all people who have a score below 70 would have deficits in more than one area. The Division has not been using the standard error of measurement in making eligibility determinations since the Supreme Court case, so this change would represent an expansion of people who could potentially be eligible.
2.12(b)	Proposed adding language to ensure that assessments of adaptive behavior are conducted according to the protocols outlined in the manual. Generally, if an assessment is not completed according to the protocols, the results cannot be considered valid.

4.7 (h)	Eliminates Intermediate Care Facility for Individuals with Developmental Disabilities (ICF/DD) as one of the currently available options in DDS in VT. The one six bed ICF/DD closed in FY21 due to the inability of the provider agency to hire sufficient nursing staff to operate the program.
5.2 (m)	Deletes this requirement as the Housing Safety and Accessibility Review Process does not apply to settings where people who self/family manage services live. This requirement is a remnant of when a few families who were managing services in a 24 hour care setting at the beginning of self/family management who were "grandfathered" in. Those arrangements no longer exist and the current rule allows for only 8 hours a day of home supports.
Part 8	As noted in the introduction, the grievance and appeals section of the regulations is being deleted in its entirety and replaced by the HCAR 8.100 which is the current regulation regarding all VT Medicaid grievance and appeals.

*New item proposed to be added.